

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9209

**BRIEF FOR APPELLANT,
DONALD WAKEFIELD SMITH**

United States Court of Appeals

DISTRICT OF COLUMBIA

DONALD WAKEFIELD SMITH

Appellant,

VS.

UNITED STATES OF AMERICA

Appellee.

**Appeal from the District Court of the United States
for the District of Columbia**

*United States Court of Appeals
for the District of Columbia*

FILED JUN 4 - 1946

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This is an appeal by Donald Wakefield Smith, from a judgment in the District Court for this District, after a verdict of guilty upon certain counts of the indictment herein. The judgment was entered on February 18, 1946,

and by it the defendant was sentenced to serve for four months to one year and a day and a fine of \$1,000 (Record pg. 3902). The sentence was a general sentence, there being no separate sentences upon each count.

The proceedings began in the Court below on January 3, 1944, when the indictment was filed in the District Court. The jury trial of the cause began on November 27, 1945, and sentence was imposed on February 18, 1946.

The irresolution of the Court below at the time of imposition of sentence, respecting the soundness of the Court's rulings upon the various questions of law raised, and the motions filed by the defendants, is some indication of the merit in this appeal. (R. p. 3903)

THE APPELLATE JURISDICTION

The judgment below is an appealable final judgment, and the appeal of the defendant, Smith, was duly noted and perfected within the time allowed by law. This Court has jurisdiction under the provisions of the Act of Congress dated February 9, 1893, 27 Stat. 435, C. 74; March 3, 1901, 31 Stat. 1225, C. 854, sec. 226; March 3, 1921, 41 Stat. 1312, C. 125, sec. 12.

STATUTES INVOLVED

The first 15 counts of the indictment are drawn intending to charge violations of Section 388 of Title 18 of the U. S. Code, commonly known as the "Mail Fraud Statute". That section reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

The 16th count was drawn intending to charge violation of Section 88, Title 18, U. S. Code, commonly known as the "Conspiracy Statute", the pertinent part of which reads as follows:

"Conspiring to commit offense against the United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties
* * * "

et cetera.

THE INDICTMENT

The indictment as above noted was returned on January 3, 1944. The first count relates that on or about June 20, 1941, and continuously through February 28, 1942, the defendants, naming seven of them, James G. Fuller, Don-

ald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall, and David Desmond, in the District of Columbia, and in Massachusetts, New York, Rhode Island, Pennsylvania, Ohio, Michigan, Indiana, Illinois, and various other places unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud certain named persons and corporations by taking from them their money, property, and other things of value. The first count covers sixteen pages of the record (Record pgs. 3907 thru 3922).

The first count may be reduced to the following:

That the defendants commencing on June 20, 1941, and continuing until February 28, 1942, in the District of Columbia and elsewhere, devised a scheme and artifice to defraud, among others, the J. W. Bishop Company, the J. J. Powers Company, Schweers & Smith, the Key West Construction Company, the Joseph Construction Company, John K. Ruff Company, the Glenwood Range Co., the Advertising Metal Display Company, the Forse Corporation and the Norcor Manufacturing company; that the scheme was that by false and fraudulent representations, pretenses and promises, the defendants would obtain money, property, and other things of value, as fees, expenses, and as security by inducing persons to be defrauded to believe that the defendants could and would cause to be procured contracts of two classes, (1) Construction contracts, and (2) Manufacturing contracts, and would procure engineering services necessary for the execution of the said contracts; whereas, as the defendants then and there well knew, the defendants *could* not and *would* not procure such contracts and engineering services. In furtherance of the scheme the defendants would organize a corporation known as the Engineers Group, Inc., establish an office or offices for the same, and take an active part in the management of the company and in the solicitation of business; would elect the defendants Curley, Fitzgerald, Fuller, Smith,

Underwood and Hall as officers of the company; would make representations as to character and position of such persons; would expend large sums for travel, hotel accommodations to establish a "front" and would incorporate certain dummy corporations; would send through the mails false and fraudulent brochures, financial statements, and would use telephone conversations, personal solicitation, letters, contracts and other writings which would consist of false and fraudulent representations and promises, which would be made with the knowledge that they were false and fraudulent, and that having devised this scheme, the defendants did knowingly, wilfully, unlawfully and feloniously mail and cause to be mailed a letter to one F. M. Gifford, of the J. W. Bishop Company, of Worcester, Massachusetts, on September 7, 1941.

The subsequent counts of the indictment, through the fifteenth count, incorporate by reference the allegations of the first count, except that the later counts set forth, in each, a separate mailing.

The sixteenth Count, a conspiracy charge, alleges that the defendants, including appellant Smith, did from June 20, 1941, to February 28, 1942, conspire in the District of Columbia and elsewhere, to commit offenses against the United States, to wit, violate Section 338, Title 18 U.S.C. and incorporates by reference the allegations of Count One of the indictment. (R. 3947). Then follow 34 overt acts. (R. 3949-53).

THE MOTIONS ANTEDATING THE TRIAL

The appellant Smith filed motions for a bill of particulars; to quash the indictment on the ground that it had been illegally procured; to inspect the Grand Jury records; and a motion to compel the prosecution to elect to proceed either on the 15 substantive counts or on the 16th count

charging conspiracy. (R. pp. 3957, 3958, and 3966.) All motions were overruled. (R. pp. 3972, 3973, and 3974.)

Upon the opening of the trial, there were before the Court the following defendants: Fuller, Smith, Underwood, Curley, and Hall. The defendant Fitzgerald had died, by then. Hall's presence was excused. A showing was made on Desmond's behalf that a critical illness prevented his appearing in Court and he was granted a severance. By the end of the trial both Hall and Underwood had been removed from the case by direction of the court; thus upon Fuller, Smith, and Curley fell the concentrated onus of all of the charges in the indictment, and all of the evidence, even the evidence introduced concerning the defendants acquitted by direction of the Court or severed from the case.

THE OPENING STATEMENT

The prosecutor's conception of the case against the defendant Smith should have been fully and fairly embraced within the opening statement of the government. In that (R. 84) Smith's connection with the so-called scheme and conspiracy is detailed as follows:

"Smith was made a vice-president and treasurer, and Bert Hall was made a vice-president and director along about the same time that Underwood came in as president, January 5, 1942. On February 16, 1942 Underwood, Smith and Hall resigned so that they were with this organization only about two months * * *."

"On or about December 1, 1941 at Washington the defendant, Donald Wakefield Smith, conferred by telephone with Donald MacGregor in Chicago, Illinois. Next * * * defendants James G. Fuller and Donald Wakefield Smith traveled from Washington to Chicago, Illinois. Next * * *

at Chicago the defendants James G. Fuller and Donald Wakefield Smith met and conferred with Don Forse, Donald Hamilton, Donald MacGregor, and other persons."

The prosecutor then recites that, at a Board of Directors meeting held about December 15, 1941, Smith was elected vice president and treasurer of Engineers' Group, Inc., and on December 16 he accepted the office and assumed to act as the vice president and treasurer. He concludes by saying that, on or about December 19, 1941, at Washington, the defendants James G. Fuller and Donald Wakefield Smith met and conferred with Don Forse and John Hamilton.

STATEMENT OF POINTS

- I. The Court erred in limiting cross-examination of the witnesses produced by the Government.

There were numerous witnesses produced who testified as to certain closely limited matters which, in some instances, appeared unfavorable to the defendants. Cross-examination was not allowed as to related activities of the witnesses, which would have explained, modified, or nullified their testimony on direct.

- II. The Court erred in admitting evidence not related to the charge, but calculated to place some of the defendants in an unfavorable light with the jury; which in the nature of the case redounded to the detriment of the other defendants.
- III. The Court excluded evidence on behalf of the defendant Smith, erroneously. The evidence was documentary, identified, and would have been strongly convincing of his innocence.

- IV. The Court erred in charging the jury concerning the continuing nature of the scheme alleged in the indictment; as to the nature of the conspiracy charged in the 16th. count of the indictment, and as to the effect which the jury could give to the evidence.
- V. The court erred in sending its written and reported charge to the jury during their deliberations.
- VI. The Court erred in sending to the jury a copy of the indictment marked to indicate that certain defendants were "out" of certain counts; by implication indicating that the other defendants were "in."
- VII. The Court erred in sending exhibits to the jury in the absence of the defendants, their counsel, and not in open court.
- VIII. The Court erred in polling the jury and in accepting the result of such poll as a true verdict, and in refusing to inquire as to open and apparent irregularities in the taking of the poll.
- IX. The Court erred in refusing to grant the motion of the defendant Smith for a directed verdict and his motion for a new trial.

SUMMARY OF ARGUMENT

There was no evidence proving a continuing conspiracy or any conspiracy between the defendants to do any unlawful act; nor that the appellant Smith took part in or was aware of any conspiracy or scheme to defraud by use of the mails, or knowingly participated in such scheme in any way; there was no showing of any intent of appellant to use the mails as a part of any scheme or conspiracy to defraud; that there was no evidence that the alleged

conspirators or schemers could not and would not in fact fulfill all of the alleged representations, nor that they made such representations with knowledge of this inability; that the appellant Smith was not connected with the corporation which was claimed to be the cloak for the alleged conspiracy, i.e. the Engineers Group, Inc., except for two months immediately before it discontinued, and that during most of that time Smith was not in possession of the records showing the financial status of the company, such records being retained by his predecessor in office; that shortly after obtaining such records from his predecessor, he resigned; that no false statements were made by him, nor did he have knowledge of any false or misleading statements; that he took no part in preparing or disseminating any false literature, brochures, financial statements or prospectuses by mail or otherwise, nor is it in evidence that he knew of them; that when queried concerning the affairs of Engineers Group, Inc., he advised that independent investigation be made. That the evidence concerning appellant Smith was wholly consistent with innocence.

That the Court below erred in admitting against him evidence concerning acts of persons, not shown to be done with the approval, connivance, consent or knowledge of the appellant, Smith, and in most instances done long prior to his knowledge of the existence of the Engineers Group, Inc., or acquaintance with any of the other defendants, and without adequate instructions as to the effect and scope of such evidence; and that there was no evidence sufficient to show that Smith joined in or was aware of the alleged conspiracy or scheme.

The Court below erred in refusing to admit in evidence documents offered by appellant, pertinent and material, and in unreasonably limiting cross-examination.

The Court erred in overruling the motions of the appellant for a directed verdict, refusing to pass upon the ques-

tion whether, as a matter of law, the evidence introduced by the prosecution was as consistent with innocence as with guilt, and whether such evidence excluded every other hypothesis except guilt.

The Court erred in failing to charge the jury fully as to the specific intent necessary to sustain a finding of guilty; and in failing to instruct that each defendant must be found to be a participant at the time of the alleged use of the mails under each count of the indictment from count 1, to and including count 15; in sending the transcript of the charge of the Court to the jury and in sending exhibits to the jury without the knowledge of appellants or of counsel; in sending the indictment to the jury during their deliberations marked in such a way as to operate to the prejudice of appellant; and in refusing to declare a mistrial on account of the inextricable confusion of the jury during the individual polling; and in refusing to inquire into the conduct of the foreman of the jury in prompting other jurors during such polling.

It was error on the part of the lower Court to accept the verdict of the jury as a true verdict, under the circumstances shown by the record; and in allowing the entry of a verdict as unanimous when the record showed that as to this appellant the verdict was not unanimous.

It was error of the lower Court to overrule the motion of the appellant Smith to set aside the verdict and for a new trial. This not only for errors committed during trial and taking of the verdict, but also for the erroneous principle of law followed by the trial Court whereby a finding of "guilty" upon the conspiracy count, (Count 16,) was accepted as sufficient to establish guilt under the substantive mail fraud counts, 1 through 15. (See the remarks of the Court, R. 3889-3890.)

Appellant also urges errors assigned in the Court below, and such plain error as was unassigned and which

this Court may notice in order that the appellant may be assured of a fair trial and that justice be done.

The conclusion of the argument of appellant is that the judgment should be reversed, and that a mandate issue directing a judgment of acquittal as to him, in accordance with Rule 29 of the Federal Rules of Criminal Procedure; or in the alternative that the case be remanded for a new trial.

ARGUMENT

THE DEFENDANT SMITH

As the evidence shows, the appellant, Donald Wakefield Smith, was a practicing attorney in the District of Columbia for many years. He also practiced law in Pennsylvania, maintaining an office there. He was well and favorably known as an attorney in a great many other States. He had been a member of the National Labor Relations Board, appointed by the President and confirmed by the Senate of the United States. After the termination of that service he again entered private practice, although not in general practice. His character according to the testimony of numerous witnesses was irreproachable.

The record shows him to have been suffering from deafness, almost total, so that a radio speaker had to be placed at the trial table during the trial of the case to enable him to follow the testimony. (R. 113.)

His first connection in any way with the Engineers' Group, Inc. came in December of 1941. On December 16, 1941, he was elected to the office of Treasurer of the Engineers' Group, succeeding Everett R. Hurt. On February 16, 1942, he resigned as Treasurer of the Engineers'

Group and terminated all connection with that corporation. J. L. Davis, an Auditor employed by the Engineers' Group, testified (R. 481) that after Smith became Treasurer in December he, Davis, undertook to set up books for the Engineers' Group but encountered great difficulty in doing so because Everett L. Hurt, the prior treasurer, had the records of the corporation in his possession; that he eventually got the records from Hurt sometime during the month of January, 1942, and then made up a set of books as best he could. One of these books is in evidence as Government's Exhibit No. 108.

THE METHOD OF INTRODUCING EVIDENCE FOLLOWED IN THE LOWER COURT

"THE COURT: Why can't we have it understood, gentlemen, that necessarily evidence must come in piecemeal. Where it is offered and admitted and connected with some one of the defendants or bearing upon a connection of some one of the defendants, it will be admitted subject to proof which will finally develop a scheme between all of the defendants. I know of no other way of handling the admission of evidence of a scheme or alleged scheme or conspiracy except by admitting it subject to proof connecting a particular defendant. In other words, it is a qualified admission and in each instance where that is done, it may be understood that counsel reserves the right to move to strike it and it may also be understood that they are objecting to its admission." (R. 118)

"THE COURT: Members of the jury, you have heard the statement I have made to counsel. In a case of this nature, it is likely that there will be many items of evidence, documentary evidence and oral evidence, which will not relate to the whole group of defendants, but to one or more of them. That evidence will, at times, be ad-

mitted by me, perhaps over objection of counsel. Whenever it is admitted please understand I am admitting it, as I have stated, subject to the duty of the Government, when all of the evidence is produced, to have connected up all the defendants in the alleged scheme or conspiracy set out in the indictment.

“It is a matter which the Court will need to rule on after the evidence is all in so, when this evidence is admitted under those conditions, please understand that it is not finally admitted as against all of the defendants and it will remain subject to the final ruling of the Court as to whether or not a particular defendant was connected with the alleged scheme or conspiracy. (R. 121)”

LIMITATION UPON CROSS-EXAMINATION

The Court erred in confining the cross-examination of prosecution witnesses too narrowly to the precise field of the direct examination. (R. 2158.) In one instance the witness, Clifford H. Williams, had testified that he was an employee of the Engineers' Group, Inc., in Chicago; the circumstances under which he had been employed; and his activities as such employee. (R. 2136.) Over objection and exception, the Court limited cross-examination, ruling that it was not pertinent to show that, to the witnesses' knowledge, there was established a legitimate office of the Engineers' Group in Chicago, paid for by the Engineers' Group, Inc., and that this was a legitimate item of expense. (R. 2158, 2162.)

In *Lindsey v. U. S.*, 77 App. D.C., 1, this Court held that the denial of the right of full cross-examination of a witness on the subject of his examination in chief is prejudicial error. In the present instance the full connection of the witness with the Engineers' Group, Inc., was not beyond the scope of the direct examination, which had covered

many phases of his transactions with members of the Group, with other witnesses, and with other parties.

The record is replete with other instances of similar limitation, particularly in the testimony of Maj. Wilford J. Hawkins.

THE ERRONEOUS ADMISSION OF EVIDENCE

During the testimony of Arthur E. Schumacher (R. 831), Schumacher stated that personal checks of James G. Fuller were returned to the Norcor Manufacturing Company on account of lack of funds. The prosecutor insisted upon the admission of the testimony over objection, and the Court stated (R. 832): "I think the transaction involving specific intent is an element of the offenses charged here, and that certainly coincidental or contemporaneous actions in the dealings of the party that would reflect on the good faith of one or another would be admissible tending to support the charge of a specific intent to defraud, which I think is an element of this offense."

This occurred on December 4, 1945.

On December 5 the Court, reconsidering its ruling of the prior day, ordered the jury to disregard the particular statement of the witness, after repeating in substance the objectionable testimony.

It is submitted that the late instruction did not catch up with the error and came too late to correct the damage done. This is but a single instance of the difficulties, almost inherent in the trial of a case of this type, with which counsel for defense were confronted.

There was never any claim made that Smith knew anything whatever about the giving of bad checks, yet the taint of the transaction permeated the case. So also as to the testimony of Curley, in Boston, respecting money transactions. (R. 3177-3188)

THE EXCLUSION OF EVIDENCE OFFERED BY THE DEFENDANT SMITH

On January 11, 1946, the Court admitted into evidence excerpts from the testimony of James M. Curley, taken in a proceeding in Boston, Massachusetts. This testimony had been admitted upon the supporting testimony of Albert P. Hill, a witness who had first testified on December 12, 1945, and who was recalled later on January 11, 1946.

On January 2, 1946, the Government had closed its testimony with the exception of the introduction of the Curley proceedings referred to above, and the jury was excused until Thursday, January 10, 1946, (R. 2854).

January 3 and 4 were occupied with motions to suppress evidence and for a directed verdict, and the Court adjourned until January 10, 1946 (R. 3316).

On January 10, the Court directed verdicts on certain counts of the indictment as to the defendant Smith and others.

On January 11 the witness Hill was recalled, testified, and the Curley testimony in Boston was admitted. Thereupon, the defendant Smith introduced the testimony of eight (8) witnesses (R. 3198 thru 3216), and rested. The Court then adjourned until Monday, January 14, 1946, (Record, page 3320,) the jury being excused until the day following, January 15, 1946.

On January 14 (Record, page 3328,) there were offered on behalf of the defendant Smith certain documents which theretofore had been marked for identification but not formally put in evidence. Their admission was objected to by the prosecution. The documents in question were important to the defendant Smith and had been marked and numbered from 1 to 20 for him. They included among

other items the deposit slips showing deposits in the bank during his term as treasurer of the Engineers' Group, correspondence from the Norcor Corporation, and the Forse Corporation, showing the relations between the two corporations and the Engineers' Group, a letter of June 14, 1943 from Donald Wakefield Smith to John L. Hamilton of the Forse Corporation, an account of deposits and receipts prepared by the witness Davis, Auditor for the Engineers' Group, covering the period from December 17, 1941 to February 13, 1942, a letter from the Faultless Rubber Company to Smith dated July 7, 1941, identified by the witness Delaney of the Faultless Rubber Company, and a signed statement showing that Smith had been authorized to issue the checks which were in fact issued by him and covering each check issued.

There was also a copy of an original affidavit furnished by Smith to the witness Anderson of the Advertising Metal Display Company, together with four (4) letters from the same Anderson to Smith.

It is submitted that an examination of these items will demonstrate their importance to the defendant Smith as showing his good faith, the absence of any knowledge on his part of any fraud or misrepresentation, and that they should have been admitted. Every item of evidence had been identified by witnesses for the Government. The prosecution had had every opportunity to cross-examine as to the authenticity of the documents at the time they were identified. There was no claim that they were not authentic. Most of them had been in the possession of the prosecution over a period of years. The objection made to the admission was on the ground of inconvenience to the prosecutor. There was no substantial reason why they should not have been admitted, yet the untenable technicality was seized upon to bar them. The fair trial of an important criminal case is hardly the place to make use of such tactics.

Steffnos v. State of Florida, 80 Fla. 313.

“To preclude one from introducing evidence so material to his defense and persuasive perhaps of his innocence, merely because he had said that he had no more testimony to offer, is to enforce a rule of procedure almost to the point of a denial of justice. It is to sacrifice liberty to a mere form of procedure or court room usage the observance of which is to bring about the orderly introduction of evidence by the respective parties. But such rules ought not to be applied with such technical precision and * * * rigor as to produce injustice. * * * The case was not technically closed. The judge had not charged the jury, the counsel had not begun the argument, the case had not been submitted. It had only reached that stage where each party announced that it rested, that there was no more evidence to be introduced. The Court then took a recess. Upon reconvening on Monday following the motion was made. Whatever delay or confusion may have resulted in the trial of the case * * * might have been fully requited by the establishment of defendant's innocence”.

“Even if the case had been technically closed it would have been an abuse of discretion to refuse to open the case and permit the evidence to be introduced * * *.”

“The refusal to allow the evidence to be introduced under the circumstances was an abuse of discretion which was harmful to the defendant and was therefore error.”

See also:

State v. Jones, 80 Wash. 588, at p. 602.

Schoenberger v. Commonwealth, 86 Va. 489, 10 S.E. 713

Etty v. Commonwealth, 130 Ky. 723, 113 S.W. 896

Martin v. Commonwealth, 145 Ky. 753, at p. 754.

This is particularly true where, as here, the prosecution was allowed the widest latitude in calling witnesses out of order, and hopping from count to count of the indictment at will.

THE SENDING OF THE MARKED INDICTMENT TO THE JURY

The Court erred in sending the indictment in this case to the Jury. The jury, having received the indictment, retained it during their deliberations. An examination of the document shows that in the margin thereof, in each count, there was a notation indicating that certain defendants were in or "out" of that particular count. And an examination of the recorded verdict of the jury shows that it followed almost religiously the notations on the indictment. What effect those notations had upon the minds of the jury we can only conjecture. We should neither be required nor allowed to guess about such matters. It is certainly within the range of reasonable possibility that they had a tremendous effect upon the jury's deliberation, as an indication of what the Court thought the action of the jury should be. The length of the jury's deliberations and the confusion attendant upon the delivery of its "verdict" lends credence to the view that the jury turned for guidance to the annotations on the indictment. Their only departure from these signposts of "out" and in, came when they acquitted Smith under the 9th, or "Ruff", count.

This Appellant is not required to go further than this and show that in fact the notations did bear weight with the jury.

Little vs. U. S., 73 Fed. 2d 861.

U. S. vs. Rubenstein, No. 51 Fed. 2d, p. 919. 96
A.L.R. 89.

The nature of the annotations were never brought to the attention of counsel by the Court; and were never in fact seen until preparing the record on appeal.

THE SENDING OF EXHIBITS TO THE JURY

The Court erred in sending to the jury three exhibits after the trial had closed and while the jury was considering of its verdict.

The record shows (R. 3905) that the Court on request of the Jury at 4 o'clock on January 18, the day on which the Jury returned its verdict, and without the knowledge or consent of the defendants, sent to the Jury Government exhibits numbers 127, 173-D, and 173-E. Exhibit number 127 was a so-called brochure, in the preparation of which the defendant Smith had no part and apparently had no knowledge. His name did not appear in the brochure, it is true, but in view of the capital made of this exhibit in the argument of the prosecution, it is apparent that it was considered an important part of the Government's case against all defendants.

The other two exhibits were checks relating to transactions claimed to have been had between defendant Curley and the defendant Fuller. Without speculating as to the use made of these exhibits in the jury room, it seems obvious that since they were presented by the prosecution as a part of its proof the undue emphasis placed upon them by permitting the jury to have them without first advising counsel of the request, and without an instruction limiting their use and cautioning the jury not to give them undue weight because of their physical presence in the jury room, was error. *Shields v. U. S.* 273 U. S. 583; *Fillipon v. Albion Vein State*, 250 U. S. 76. *Wheaton v. U. S.* 133 Fed. 2d 522. *Winebrenner v. U. S.* 147 Fed. 2d 322, at p. 329. *Parfet v. Kansas City Life Insurance Company*, 128 Fed. 2d 361. *Alger v. Thompson*, 1 Allen (Mass.) 453. 3 Am. Jur. 603; Sec. 1050. 22 A.L.R. 254; 34 A.L.R. 103; A.L.R. 1466; 84 A.L.R. 220; 96 A.L.R. 899.

Regardless of any relaxation of the rules formerly followed in denying such exhibits to the jury under any circumstances except the consent of counsel for all parties, the rule has never been relaxed to a point where exhibits can be sent to the jury without counsel for defendants having an opportunity to examine them, to object to their transmission, to request instructions to the jury concerning their use, and to request that other exhibits qualifying them or explaining them be sent to the jury with them. It is submitted that this action of the Court constituted grievous error.

THE VERDICT AND THE POLLING OF THE JURY

The Court below erred in accepting the verdict of the jury as given; and in polling the individual jurors as to their verdict.

The confusion into which the jury had fallen by the time it had come into Court to announce its verdict can be demonstrated by an examination of the record covering the first verdict and the two subsequent verdicts when the Jury was polled. (Record pp. 3755 through 3783.) The first verdict was given by the Foreman of the Jury. Thereupon a request was made that the jury be polled, in which request all defense counsel joined. Whereupon the Court stated that the Clerk would:

“Call the individual names of each juror, he or she will then individually give the verdict which he understands the jury has agreed to—not any individual views which during your deliberations may have been expressed, but the verdict which you have agreed upon, you will each individually express that to the Clerk, as your names are called * * *.”

“I assume the best thing to do is to ask it as to each defendant. First call the roll as to Fuller, and then as to Smith.

“(To the Jury:) As your name is called, stand and give what you understand to be the verdict which has been agreed upon.

“THE DEPUTY CLERK: Edward Clarke, what is your verdict as to James G. Fuller?”

“THE COURT: Pardon me—“what is the verdict of the jury?”

“THE DEPUTY CLERK: What is the verdict of the jury as to the defendant James G. Fuller?”

This form of question was asked of each juror as to each defendant. When the juror Peacock was reached in the poll, (Record 3762,) the record shows the following:

“THE DEPUTY CLERK: What is the verdict of the jury as to the defendant Donald Wakefield Smith?”

“JUROR PEACOCK: Not Guilty on nine; guilty on thirteen, fourteen, fifteen, sixteen.”

Polling of the jury continued until all jurors had rendered “The verdict of the jury”.

Then, (R. 3767) occurred the following:

“THE COURT: Members of the Jury, I note a variation in your individual announcements of the verdict that you have agreed upon, in the case of three of you. I can understand that that might occur, in view of so many counts and the several defendants. However, without intending at all to have you change what may be your true understanding of the matter, I want you to return to the Jury Room and recheck your own mind and memory to be sure whether or not you have individually reported correctly what you understand to be the verdict, and if you have a correction to make, to be prepared to do it when I send for you.

“I will ask for the Foreman to notify me as soon as that has been done, and I will call you back.” (cf. p. 7)

“MR. McKENZIE: May we approach the bench before you discharge the jury?”

“THE COURT: Yes, surely.

(To the Jury:) I may say this, ladies and gentlemen, that in taking this individual poll the idea is that each juror shall give his own understanding of the verdict

which has been agreed to, and the verdict which he here as he sits in the box approves as the verdict of the jury. That is "what your individual statement of the verdict is checked for, so as to get an understanding of what has been agreed upon among the twelve of you, and that that is the verdict which you now here approve as to the verdict of the jury."

On the second polling of the jury, the Juror Peacock again, when questioned as to the defendant Smith, returned the verdict:

"Number nine, not guilty; 11, guilty, thirteen, fourteen, fifteen, and sixteen."

It is respectfully submitted that an examination of the stenographic report of the jury poll shows that, with respect to the defendant Smith, the Juror Peacock rendered no verdict whatever on counts thirteen, fourteen, fifteen and sixteen of the indictment, although he did render a verdict of not guilty on Count Number Nine and Guilty upon Count Number 11.

It is further submitted that the refusal of the Court to interrogate the jurors concerning communications between them respecting supposed mistakes in the verdict; to inquire into the conduct of the Foreman of the Jury in communicating with jurors during the rendering of the verdict on the poll, and in advising the jury (R. 3781) that they should not discuss the case with anyone concerning anything that had gone on among them as jurors unless they did so at the direction of the Court itself; that they not discuss it with anyone on the outside, was greivous error. The effect of this instruction to the jury was to prevent inquiry on behalf of the defendants after the expiration of the term of the jury's service in this case to determine whether or not anything improper had transpired during their consideration of the case. Such an instruction is not in the interest of justice, when facts are disclosed as they existed here.

It is further submitted that in polling the jury each juror

should have been asked as to his own individual verdict, not "What is the verdict of the jury?"

The purpose of polling the jury is to obtain the individual response of the juror whose name is called.

"Upon the poll, it was the duty of each juror to say for himself whether he found the prisoner guilty of the murder in the first or second degree. We all know that jurors sometimes, upon the poll, dissent from the verdict declared for them by their foreman, and it is for the purpose of compelling each juror to declare his own verdict, in his own language, that a poll of the panel is allowed."

Jason Williams vs. The State of Maryland, 60 Md. Reports 401. To the same effect is *Mattice vs. Maryland Casualty Company*, 5 Fed. 2d. 233.

Some idea of the confusion exhibited in the jury box during the polling can be extracted from the following: (R. P.).....)

MR. McKENZIE: If your Honor please, I object to the foreman of the jury prompting jurors, and I ask for a mistrial on that proposition. This is the third time he has done it."

"THE COURT: Just a minute please. Let us not get excited."

Perhaps counsel should not have gotten excited at this picture of the foreman of the jury talking to jurors as they were being polled. Mr. McKenzie, counsel for the defendant Fuller, called the attention of the Court to the fact that it had happened three times. Counsel could not prevent it. The court announced:

"THE COURT: I will say to counsel that I am conducting this, and not counsel. I think counsel are experienced enough to contain themselves while the Court is talking to the jury. I think I have a right to conduct this as I think proper."

Counsel subsided.

Mrs. Charron, one of the jurors to whom the foreman had been whispering while she voted, (R. 3777.) gave a partial explanation of her conduct, as did the foreman, (R. 3778.) But why the foreman was allowed to correct her, and what he had said to the other jurors, was never gone into. There is no explanation in the record; counsel were not allowed to inquire; the Court would not inquire; and the jury was warned not to talk. (R. 3761.)

There is a well established procedure for polling juries in the District of Columbia. The Clerk asks each juror his verdict as to each defendant on each count of the indictment separately, and records it as it is announced. This was not done in this case. Each juror was allowed to roll off a string of numbers corresponding to the counts of the indictment, and they were recorded by the Court Reporter. Examination of the verdict on each poll, as announced by the juror Peacock, shows that he announced no verdict as to Smith as to counts 13, 14, 15 and 16 of the indictment. The reporter has attempted to punctuate the juror's announcement, but even then it is not understandable. When Peacock said, "Number Nine, not guilty" he evidently started to enumerate the separate counts of the indictment and give his verdict on each one. He next said, "11, guilty," but as to 13, 14, 15 and 16, he made no follow-up announcement of his verdict. The reporter might well have reported the punctuation in this way: Number nine, not guilty." "Eleven, guilty." Thirteen, fourteen, fifteen, and sixteen—". So we are dependent upon the punctuation of the reporter for our understanding of the verdict. It is respectfully submitted that the liberty of the defendant Smith, under the circumstances of this polling, should not be made to depend upon such a slender reed as punctuation, as to which speculation might take the place of certainty, and the usages of grammarians supplant what should be the one fixed "true word" of the juror.

**THE COURT ERRED IN REFUSING TO GRANT THE
MOTION OF THE DEFENDANT SMITH FOR A
DIRECTED VERDICT AND FOR A NEW TRIAL**

1. The motion for a directed verdict.

The motion for directed verdict is set forth in the record. At the time of the making of the motion and at the close of the case the evidence as to Smith was so clear that the court felt impelled to direct a verdict in his behalf as to all but one count of the so called construction contract counts, namely number nine count of the indictment. On this count the jury found him not guilty. There was not in the evidence any clear and convincing proof of his complicity in a scheme to defraud; nor in any conspiracy. The Court below was asked to exercise the function which this Court in the case of *Hammond v. U. S.*, 75 App. D. C. 397; 127 F (2d) 752, said that it must exercise; namely, must consider whether the evidence excluded every other hypothesis but that of guilt; and if the substantial evidence should be as consistent with innocence as with guilt, the trial court must direct a verdict for the defendant.

In this case the testimony relating to Smith is set forth in the appendix. It must be seldom that a man against whom such flimsy and insubstantial evidence is produced is required to go to a jury. The principal points relied upon by the prosecution as evidence of guilt do not involve him. The record is without contradiction that everyone who dealt with him was told the truth; that all his actions were straightforward. That he sought no one out. That he was never involved in any false statements. The brochure was none of his. He was not named in it nor connected with its preparation. He was not connected with the Engineers' Group for longer than two months. It took him almost all of that time to get the necessary information from his predecessor in the office of treasurer

to determine the financial condition of the concern. He contributed his own money during that time, to the amount of more than \$1,000.00. (R/1504) He took neither salary, nor anything else. The evidence does not indicate that he had any inkling of any corrupt agreement. On this record he was entitled to a directed verdict. *U. S. v. United States Gypsum Co.* 51 F. Sup. 613, in which the cases are reviewed. *Cady v. U. S.* 54 App. D. C. 10, 11; 293 Fed. 829.

CONCLUSION

It is respectfully submitted that the judgment and sentence as to the Defendant, Donald Wakefield Smith, should be set aside and the case reversed with instruction to the Court below to grant the motion for a directed verdict at the conclusion of the evidence; and that a judgment of acquittal be entered in accordance with the provisions of Rule 28 (a) of the Rules of Criminal Procedure of the District Courts of the United States.

WM. A. GALLAGHER,
Counsel for
Donald Wakefield Smith.

APPENDIX

In connection with the objection and exception to the refusal of the Court to admit into evidence the documents proffered on behalf of Smith toward the close of the trial, the attention of this Court is directed to Page 171 of the record, where Smith's Exhibits No. 1 and No. 2 were identified, that date being November 28, 1945 and the exhibits having been in the possession of the Clerk of the Court continuously after that time.

FRANK M. GIFFORD

On Page 470 of the record Frank M. Gifford, the President and General Manager of the J. W. Bishop Company, states that the name of Donald Wakefield Smith was mentioned to him in New York in August of 1941 as a former member of the National Labor Relations Board; and on Page 500 the same witness identifies a check for \$3,100 dated January 15, 1942, check number 186, signed by Donald Wakefield Smith, Treasurer of the Engineers' Group, Inc., at that time, payable to the J. W. Bishop Company.

GEORGE E. ROCHEFORD

The witness Rocheford, testifying as to the transactions referred to in count 1 and overt act No. 6 of Count 16, of the indictment, testified at pages 819 and 820 of the record that the first time he had heard that his corporation was supposed to have been the victim of a mail fraud was approximately a year and a half before that date, December 4, 1945, when he was interviewed by a Federal Bureau of Investigation agent at Syracuse; that he did not know

Donald Wakefield Smith and never heard his name mentioned in connection with any of the transactions.

ARTHUR E. SCHUMACHER

Arthur E. Schumacher, President of the Norcor Manufacturing Company, at Page 823 of the record recited that he had met James Fuller, James Barton Underwood, Bert Hall, and "a Mr. Smith" and a Mr. Englehardt in Chicago in the first part of December 1941 at the Furniture Mart.

However, at Page 837, Schumacher says in answer to an instruction of the Court:

"As I mentioned before, Mr. Fuller, Mr. Hall, Mr. Underwood, and Mr. Englehardt, Mr. Williams, were those that I remember were present at the Blackstone Hotel during the discussions concerning the Norcor contract and transaction."

The record further shows that Smith's presence in Chicago at that time was not in connection with any Engineers' Group business and concerned some effort on his part to obtain priority materials for Englehardt in connection with an entirely different matter. It was at the meeting in the Blackstone Hotel that the representations, if any, were made to Schumacher concerning the ability of the Engineers' Group to furnish engineering services; and some conversation was had apparently concerning a Dun and Bradstreet report. This was in the absence of the defendant Smith. And Schumacher later testifies (at Page 840 of the record) that he never saw Smith in person in connection with the Engineers' Group or any transactions with them.

LLOYD A. BREUER

With respect to the Dun & Bradstreet reports, the information concerning them according to Lloyd A. Breuer, a representative of Dun & Bradstreet, was received on November 6, 1941, and there is no intimation in the record that Smith had anything to do with them or in fact knew that such reports had been based on any information obtained from the Engineers' Group, Inc. In fact, (Page 944 of the record.) Breuer's testimony covers principally the date of November 6, 1941, prior to Smith's connection with the Engineers' Group.

HAROLD E. FULLER

Harold E. Fuller, identified in the record (P. 969) as the Secretary of the Norcor Company, testified that the transactions he had with James G. Fuller took place late in February of 1942. (Smith resigned February 16, 1942.)

MALCOLM M. LEACH

Malcolm M. Leach, record page 1018, testifying for the Government, identified himself as Vice President in Charge of Sales of the Glenwood Range Company of Taunton, Massachusetts; that that Company was offered contracts through the Engineers' Group but that the contracts were not acceptable. The true reason for the failure of the Glenwood Range Company to undertake the principal contract offered it is disclosed in the testimony of Major Wilford J. Hawkins, whose testimony begins at Page 1789 of the record.

The contract between the Engineers' Group, Inc., and the Glenwood Company is Government Exhibit No. 81-A,

and contains this provision concerning the fee which was deposited by the Glenwood Company: "This fee is to be adjusted in six months' time—either up or down—depending upon the amount of business taken during that period—or returned to us in the event that no business is secured."

This contract is dated October 10, 1941 and the expiration of the six months' date would occur after April 10, 1942, a date when the defendant Smith had been separated from the Engineers' Group for two months.

In addition to this, Leach further testified (R. 1118) that the money put up by the Glenwood Range Company had been put up to cover expenses of the Engineers' Group in securing contracts, and that it was to be expended in all or in part for this purpose and that he had no idea of what part had been so expended, although he knew that there was considerable expense undertaken by the Engineers' Group.

WILLIAM P. HASKELL

Mr. William P. Haskell, of the firm of Schweers and Smith, whose transactions are covered in count 2 of the indictment, testified that although he had met the defendant Smith in December of 1941 or January of 1942 in Washington and was told that he was the treasurer of the Engineers' Group at that time (R. 1161), yet he had had no detailed conversations with Smith because he was not involved in the details of the housing contracts, and this although Haskell was in Washington about ten days of each month about the Schweers and Smith project. Haskell only knew that Smith was the newly elected treasurer of the corporation (R. pp 1200 and 1202). Schweers and Smith had their deposit of \$3500 returned to them on January 7, 1942.

After the witness Haskell had left the witness stand, a stipulation was entered into between the government counsel and Smith's attorney, which shows fully the true place which Smith occupied in the picture. In that stipulation Haskell indicated that it was his intention to employ Donald Wakefield Smith in Washington, if attorney services were desired here.

HARRY DONALD FORSE

Harry Donald Forse, of Anderson, Indiana, President of the Forse Corporation, in 1941, testified respecting Smith as follows (R. 1220): John Hamilton and Forse met Fuller and Smith at the Blackstone Hotel in Chicago, along with a Mr. Englehardt, on the day before Pearl Harbor, December 6, 1941, as a result of an appointment made by Mr. Englehardt.

On December 6th of that year Smith had no connection with the Engineers' Group. During the 16, 18, and 19 of December of 1941, Smith was not present during any conference had with members of the Engineers' Group. At record P. 1318 he testifies that he would not know whether Donald Wakefield Smith was in Washington on the 18th and 19th, nor is he at all certain that Mr. Smith was present at the conference on the 16th of December, and he did not recall anything that Smith said or that he did say anything at the time that Forse met him. Forse knew that the money put up with the Engineers' Group by his company would be spent by them in their work; (R. 1354) He was satisfied to go ahead with them even knowing that there was only a small balance in their Washington bank, and no deposit in the Pilgrim Trust of Boston; it did not make any difference. (R. 1353.) He knew pretty definitely what they were using the money for. Forse took up a number of their problems with Smith after Smith's resignation from the Group, even as late as 1943, and has no complaint. (R. 1359.)

JOHN L. HAMILTON

John L. Hamilton, a representative of the Forse Corporation, testified that he met Smith for the first time in November 29, 1941, incidental to a trip to Washington with Englehardt. Asked Smith's legal opinion at luncheon concerning a phase of government contracts. Smith, he understood, expected to become associated with an engineering group. (R. 1359.) Does not recall that Smith ever recommended the Group to him or Forse at any time. Smith made no statement in his presence as to who was connected with the group nor what they could do or how they could do it, or anything concerning Engineers' Group. (R. 1374.)

J. L. DAVIS

J. L. Davis, auditor for the Engineers' Group, testified that he was sent to Fuller by Robert Thach; that about two weeks after Smith and Underwood resigned the Truman Committee came to the office of the Group and got all the files that he had. He was there when Smith and Underwood resigned. (R. 1402.) About the latter part of January, 1942, the witness finally got from Hurtt the cancelled checks of the company, together with check stubs and deposit slips, from which he prepared the cash receipts and disbursements book. (Govt. Ex. No. 122.) When Smith was treasurer he furnished him with daily balance statement. Smith was in the office about half of the time, and Underwood the same. * * *

About the middle of February, having had difficulty in getting the records from Everett R. Hurt, the former treasurer, at Smith's request witness prepared a statement which then reflected the condition of the books from the time Smith took office up to the time he resigned. (Smith

Ex. for Identification No. 15.) He identified this exhibit as the statement referred to.

That although there was a book overdraft shown on February 7, 1942, a check, No. 526, was not to be cashed and was to be voided, which, together with a deposit made on February 2, 1942, left a credit balance of \$832.35. There was a deposit on February sixth, of \$3,750.00, and against this a check for \$3200.00 was issued to the Joseph Engineering Co., by Smith. Both Davis and Smith had seen the duplicate deposit slip showing this deposit, before the \$3200.00 check was issued. The witness identified a number of checks made payable to hotels, which he said were for telegraph money orders. That when calls came for travelling expenses or engineering fees in a hurry, Smith would get a check cashed at the Mayflower Hotel and wire the funds. He then identified a number of items showing money wired to Fuller and Major Hawkins. He stated that Smith advanced money for salaries and deposited his own money in the bank from time to time for Group expenses, and advanced in excess of \$1,000 in this way. (R1504

WILLIAM HAYS FORSTER, JR.

Testified he was the son of the president of the Hays Manufacturing Company of Erie, Pennsylvania, as follows:

He was in the manufacturing business in 1941 and 1942; in the fall of 1941 he learned of the existence of the Engineers' Group, Inc. They were having an election at the plant (Union?). They were having business difficulties. He learned from Mr. Beach, from the National Labor Relations Board, of Donald Wakefield Smith; that he received a phone call from Mr. Beach on the 19th or 20th of January, 1942, and as a result went to the Lawrence Hotel in Erie, with Smith and Engelhardt. Beach was there

also. Smith had received a list of the Hays Company's facilities and said he thought they were in a position to do war work—manufacturing parts for aircraft, and that he felt sure that with their connection they could get the work. Smith mentioned a Major Hall, and said he had had a great deal of interest in aviation and was well thought of by manufacturers of aircraft. That Hall's experience, etc., would be of great aid in getting contracts. Conference lasted about half an hour. The next day Smith, Engelhardt and Hall came to the plant. Smith told Forster Senior how they could get contracts through Major Hall. Smith said that there would be a fee of six per cent to be paid to the Engineers' Group, and a down payment to be made prior to getting any contracts which was to take care of preliminary engineering, about \$7,000 or \$7,500. They said they would have to send men out to the plant to look over the equipment and there might be some re-arranging. This fee was to be returned if they failed to get the contracts. Hall corroborated Smith as to his contacts with manufacturers of aircraft and that they would almost take his word as to the capability of the Hays Company being able to produce. Smith mentioned two companies, the Forse Company, and the Glenwood Range. One he said they had gotten contracts for. Then, Fuller and Curley were mentioned, either by Smith or Engelhardt. Ultimately the Hays Company decided not to enter into any dealings. (R. 1451). On cross examination (R. 1453), they never put anything into the Engineers' Group project, and have no complaint.

That at Smith's suggestion they wrote letters to the Forse corporation and the Glenwood Range Co., so that they could have some independent information as to the nature of the work that Engineers' Group were doing. (R. 1457)

WARREN DELANEY

Warren Delaney, President of the Faultless Rubber Co., of Ashland, Ohio, testified that he had corresponded with Donald Wakefield Smith in August of 1941, and subsequently. He came to Washington looking for Smith some time in January, 1942. He talked with Smith about getting contracts for his company. Smith explained to him the terms on which the Engineers' Group undertook such enterprises, and as a result of his conversation with Smith he decided not to pursue the matter any further. That Smith had never contacted him concerning the Engineers' Group, Inc., nor had mentioned it to him in any way before January 12, 1942, (R. 1540.) To the question, (R. 1549), whether he had found as a result of his transactions with Smith he had been misled in any way, the objection of the prosecution was sustained by the Court, and exception noted. The substance of his testimony is to the effect that he was not misled, nor was any attempt made by Smith to deceive him.

DONALD MacGREGOR

MacGregor, of the Webster Chicago Corporation, as a result of meeting Clifford Williams, was introduced to Fuller and Smith in the Blackstone Hotel in Chicago. His memory, he states, does not serve him too well. (R. 1949.) He discussed the situation of getting contracts for his plant with Fuller. (R. 1947.) He thought that Smith told him about a stove company in New England. Smith's statements were general and not specific. Smith also told him that highly respected engineers were connected with the Group. Fuller promised him a copy of a prospectus, (Gov. Ex. 127) and he later received it from Williams. He also saw a copy of a type of agreement used in the Glenwood Range matter. (R. 1954.) There was nothing in the pros-

pectus, (Gov. 127), the names of the persons mentioned in it nor their background, which caused him to be impressed, or so favorably impressed that he wanted to do business with them. He had lost interest in the proposition. (R. 1983.) He was unable to identify the defendant Donald Wakefield Smith as the person to whom he had talked in Chicago. (R. 1984.)

RALPH T. SCANTLEBURY

Ralph T. Scantlebury was connected with the Toycraft Rubber Co., of Ashland, Ohio. He met Smith in Washington, on December 29, 1941, and discussed labor relations with him. (R. 1977.) He never discussed the Engineers' Group with him. (R. 2005.) When he talked with Smith "the cards were on the table." (R. 1999.)

ALLAN H. STURGES

Sturges testified that he is president of the Pilgrim Trust Co., of Boston. That the Engineers' Group never had an account in the Bank, nor any money on deposit there, nor any credit arrangement with the bank. He met a Mr. Smith in the Bank in December, 1941, and had a conversation with him about a loan to the Engineers' Group. The bank was not interested. He could not identify Donald Wakefield Smith as the man to whom he was referring. (R. 2064.) That the meeting with the Smith he described was on December 19, 1941. (R. 2069.) (December 19, 1941 is the same day that the prosecution puts Smith in Washington, conferring with Forse and Hamilton.) (R. 84.) That he made no notes of the conversation.

CLIFFORD H. WILLIAMS

The witness Williams testified that he was employed as an agent of the Engineers' Group by Fuller, in Chicago, in the Fall of 1941. (R. 2136.) Brought McGregor to meet Fuller and Smith. Met Smith through Engelhardt. Re-

ceived Group Brochure, (Gov. 127), from Fuller and delivered it to MacGregor. Englehardt was also employed to work with him as employee of the Group. When he met Smith with Englehardt, Smith was not an officer of the company. (R. 2149.) Hurt was then treasurer. Thach was General Counsel. He understood that Smith was present as a Washington attorney, a friend of Englehardt's. That this meeting with Smith had nothing to do with the Engineers' Group, so far as he knew, nor with Fuller. (R. 2152-2155.) In the conversation with MacGregor, Smith said nothing about the officers, engineers, or persons connected with the Group. Does not recall whether Smith was present when the brochure was mentioned.

No. 9209

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

DISTRICT OF COLUMBIA

DONALD WAKEFIELD SMITH,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States
for the District of Columbia

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*United States Court of Appeals
for the District of Columbia*

FILED

Joseph M. Whitcomb

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9209

DONALD WAKEFIELD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANT DONALD WAKEFIELD SMITH

The prosecution in its brief, as well as in its presentation of the evidence in the Court below, blandly ignored the true picture in the industrial United States during the years 1941 and 1942. That manufacturing plants were in desperate straits, that unemployment was menacing the economic life of the country, that the central Government had to be consulted, its approval and co-operation obtained before any wheels could turn or any supplies and machinery procured, that builders and manufacturers were flocking to Washington in the hope of finding here the ans-

wer to their overwhelming problems, that the industrial life of the nation was in a state of confusion approaching chaos; and that all of these things were well known to every man in business,—makes no difference to the prosecution. It is important, however, when defendants are charged with holding out the hope to prospective clients that some essential help can be given them, that they can be brought into touch with the needs of the nation, and that contracts which are available may be made available to them. It was inconceivable then that such hopes should be twisted into guarantees. Who in Anno Domini 1941 and 1942 could guarantee anything in the commercial world? Who in the commercial world would rely upon such a guarantee if it were given? It was a time of effort, struggle, hard work, and hopes for the future. Looking back over the times from this perspective, the prosecution says that the partial failure of those hopes, efforts and struggles makes up a criminal conspiracy, and a scheme to use the mails to defraud.

The Appellee's brief, by the grouping together of all of the defendants indicted under the terms "defendants" and "they", creates the impression that the appellant Smith had knowledge of and participated in the many alleged acts, representations, and transactions from the inception of the Engineers' Group, in the spring of 1941, and through its lifetime, and in relation with its so-called "victims". The evidence is to the contrary; and definitely establishes not only that proof is lacking, but that Smith neither had knowledge of nor was he a party to any of the alleged misrepresentations.

The verdict directed by the trial Judge, and the so-called verdict of the jury on the substantive counts of the indictment, completely eliminates Smith from consideration as a participant in any of the so-called "construction contracts". Therefore, in this reply brief, the attention of the

Court will be called to those "manufacturing contracts" with which Smith had any connection, the understanding of the "victims" respecting the purpose for which deposits of money were made and the use to be made of such money.

THE COMMENT IN APPELLEES' BRIEF AS TO THE FAILURE OF THE DEFENDANTS TO TESTIFY.

Appellee's counsel, in argument before this Court, placed emphasis upon the fact that the defendants did not testify in the lower Court. This Court inquired as to the significance of the statement, and got no answer. At page 22, top of page, in Appellee's brief, counsel had already brought this matter to the Court's attention. There, commenting upon a point of law quite foreign to this, we find:

"See the case of *Morely v. United States*, 99 F.(2) 683, in which another ex-Governor of Massachusetts and a lawyer sought to escape the consequences of a mail fraud prosecution on the ground that he was inactive in the enterprise and did not know what his subordinates were doing. MORLEY TOOK THE STAND, denied knowledge and professed good faith and innocence, WHICH NONE OF THE APPELLANTS DID IN THE CASE AT BAR,——" (Capitalization supplied.)

In a paragraph replete with innuendo, but barren of reference to pertinent facts, on p. 21, the prosecutor says again:

"Curley did not take the stand to testify,——"

These three incidents are not new tactics in this case. In arguing the case to the jury, below, Government counsel commented upon the failure of the defendants to produce witnesses, as follows:

(R. 3678.) "And where is the man he got the contract for? Did they call the man they got the contract for and let him tell you about it?" (He was not talking about any-

thing put in evidence by the defendants, but about a statement made by a Government witness.)

“MR. McKENZIE: Your Honor, I object to that. We must take exception to that line of argument. That rule of law is well known to everybody.

“THE COURT: The objection is overruled.”

And again in the same argument, at page 3701-2 of the record, a comment on similar lines is interjected by the prosecutor:

“Another argument is that the Government did not call certain witnesses——” (The witnesses referred to were among the eighty persons identified to the jury at the beginning of the case as Government witnesses and summoned as such by the prosecution.) “All of them would lead you to believe that simply because the Government had subpoenaed certain witnesses, the defense lawyers could not call those witnesses.”

“MR. McKENZIE: I object to his commenting on the failure of the defendant to put on a defense.

“THE COURT: Step up here Mr. McKenzie.”

“(Counsel approached the bench and conferred with the Court as follows:)

“Mr. McKenzie: I object to such comment, may it please the Court.

“THE COURT: Do not be too sure of yourself on that. I denied your motion yesterday, and I am denying it today, because he is not referring to the failure of the defendants to testify; HE IS MERELY REFERRING TO THE FAILURE OF THE DEFENDANTS TO PRODUCE EVIDENCE which he claims is in his favor. THAT IS PERFECTLY LEGITIMATE COMMENT.” (Capitals supplied.)

All counsel had the benefit of the exception. This is plain reversible error.

**APPELLANT SMITH NOT CONNECTED WITH
CHARGES IN COUNT 14.**

Reference is made in Appellee's brief (page 27), to a conference which Leland B. Smith of Apco-Mossburg Company is alleged to have had with Fuller, Underwood and Smith in New York late in December, 1941, in connection with the "sale of the Apco-Mossburg Company" and, further, that the witness Smith "understood the money was on deposit in some New York bank." The record shows that this witness testified he "met a Mr. Smith", but could not identify him, and would not recognize him (R-2449). The objection of this appellant that there was complete failure of identification was overruled and this testimony admitted. An objection of counsel for the defendant Underwood on the same grounds was sustained, (R.-2455-56). There is no evidence that appellant Smith at any time had any discussion with this witness or any representative of Apco-Mossburg Company or had any knowledge regarding any agreement, fee or manufacturing contract and the only alleged "talk" with appellant Smith was at the Sher-ry-Netherlands Hotel in New York, with Fuller and Underwood present, on or about December 31, 1942, in connection with "the *possibilities* of the *sale* of the Company" and in connection with this the witness testified he did not remember anything Smith might have said (R-2454). The witness was asked on direct examination "had there been any discussion as to the ability of these gentlemen to pay for your plant", to which the witness testified—"No, there had not been other than that we understood the money was on deposit in some New York bank" (R-2454). All of the above mentioned testimony was over the further objection of appellant's counsel that the appellee had clearly stated, upon inquiry of the Court below, that he had concluded direct examination of the witness. The above is the only evidence having to do with appellant Smith in connection with the

Apco-Mossburg Company, constituting the basis for Count 14 of the indictment which covered communications identified by the witness, Miss Cooksey, as written at Fuller's direction and signed by her. (R. 2472.) This company did not enter into any agreement with or pay any moneys to Engineers' Group. Yet the jury was permitted to speculate, and convicted Smith on this insubstantial evidence.

THE FORSE, NORCOR AND ADVERTISING METAL DISPLAY COMPANIES.

The record clearly establishes that there were only three companies which retained the Engineers' Group during the period December 16, 1941, to February 16, 1942, Smith's tenure in office. These were (1) the Forse Corporation, (2) The Norcor Corporation, and (3) the Advertising Metal Display Company. With the latter company, Smith never came in contact until after his resignation from Engineers' Group. No one connected with the Norcor Co. ever saw or had any dealings with Smith. There is no evidence that he had knowledge of or participated in any transaction between Engineers' Group and the Norcor or Advertising Metal Display Companies.

The statement on the Appellee's brief that "not a single victim of the scheme obtained a contract," is a play upon words, and does not accurately reflect the true character of the agreements themselves or the activities of the Engineers' Group in pursuance of the agreements between the Group and the alleged "victims", and the strenuous efforts made to perform under those agreements. Certainly competent engineering surveys looking toward plant conversion to wartime needs were made in every instance.

That the Group did make contracts available to its contractor-clients is, as hereinafter set forth, very apparent from the record. The statement of Appellee that no contracts were obtained or tendered is wholly contrary to the

record. The record shows, that in every instance with which Smith could conceivably have had any connection, there were either tenders of contracts or the action of the Engineers' Group resulted in contracts being made available.

Furthermore, the record demonstrates that every "victim" which entered into agreements with the Engineers' Group during Smith's connection therewith, plainly understood that the so-called deposits were not deposits in escrow, but were to be used by the Group for its own expenses, and no demand was ever made by any of these "victims" for the return of such deposit, during Smith's tenure. The Appellee stresses that where such demand was not made it was because it would have been useless, since Engineers' Group had become defunct and there was no one upon whom such demand could have been made. The record shows that Engineers' Group functioned after Smith's resignation, and that the alleged "victims" continued to do business with the group after they had been informed of Smith's resignation.

NO STOCK WAS ISSUED—NO OFFICERS' SALARIES PAID.

To the statement on page 2 of Appellee's Brief, that "No stock was ever issued" by the Engineers' Group, Inc.," might be added also that *no salaries were paid the officers of the corporation*. This is truly a novel recital in a mail fraud case: no stock was sold to the public, and no salaries were paid to the officers. Quite different from the familiar mail fraud evidence, where inevitably funds raised from the sale of stock are diverted and dissipated in magnificent salaries paid to officers. Here the officers came by nothing but hard work, strenuous efforts for clients, and a criminal prosecution. At least one of them, Smith, advanced from his own pocket more than a thousand dollars to the company.

SMITH SUGGESTED INDEPENDENT INQUIRIES

Again, in the Appellee's brief, p. 3, it is stated that the "defendants, sought unsuccessfully to induce many others to pay over monies to Engineers' Group under misrepresentations and inducements." The record does not in any particular, even remotely, establish that Smith at any time or any place knowingly made any false statements, misrepresentations or inducements, or "solicited" advance fees or deposits. On the contrary, as will be demonstrated, appellant Smith suggested to those with whom he came into contact, that they make independent investigations of their own, giving in each instance pertinent references.

SMITH AS TREASURER

It is charged in the Appellee's brief that "the deposits were spent as fast as they were received." There was no proof of any character that during Smith's tenure as treasurer any monies were expended for other than proper and legitimate purposes consistent with the normal operation of a business enterprise of similar character and consistently with the understanding of those who contributed money to the enterprise during his connection with it. By indirection however, Smith has shouldered over on him the conduct of his predecessor in office, Hurt, whose integrity is not questioned by the prosecution, but who served from the inception of the Group until December 16, 1941, and as treasurer issued checks for sums vastly in excess of the funds expended by Smith. This former treasurer was neither indicted, nor was he called as a witness by the prosecution, although this was promised. On pages 6 and 7 of Appellee's brief, the handling of funds by Hurt, as treasurer, is imputed to Smith.

With regard to the charge of Smith's issuing of certain checks creating overdrafts when he "took over as treasurer," as alleged on page 27 (b) of appellee's brief; appellee states that when Smith took over as treasurer the bank

balance was \$115.55 and that the first two checks issued by Smith "created overdrafts." Government Exhibit 6 disproves this claim. It shows no such alleged overdrafts were "created," and the testimony of the auditor, Davis, establishes that a \$1,000 deposit was made at this time as shown in the bank ledger sheets, but was, through Davis' error, not shown on the check book stubs, (Gov. Ex. 106.) (R. 1665). There was no overdraft whatever. Davis was not able to, and did not, balance the check book against the checks written until about the middle of January, 1942—this because Smith's predecessor, Hurt, retained the records necessary to disclose a correct book balance. (R. 1402, 1482 and 1488) so that an overdraft might have been excusable.

The testimony of Davis, the auditor, is a complete refutation of the statement on page 28 of Appellee's brief that Smith issued checks against insufficient funds. The record shows that Engineers' Group check No. 156 for \$100.00 was never used, which further increased the balance, and had the account been as Smith and Davis believed it to be, had a \$750.00 check not been improperly cashed by Williams in Chicago, and had the Newcomb deposit in fact been a cash deposit of \$3750. as they thought it to be, no overdraft would have resulted in the issuance of any checks by Smith. In fact, the \$750.00 check in question did not reach Washington for collection until after Smith's resignation. (See Gov. Ex. No. 105)

On page 28(f), it is recited that Smith wrote a check to Joseph Engineering Co. for \$3200 against a deposit of a check given to Fuller by Irving Newcomb for \$3750, and stated that such deposit was for collection only, with payment being subsequently stopped. It is further argued that Smith knew he was writing a bad check and concludes that, even though the \$3750 deposit was a good one, the \$3200 check would have created an overdraft. Such statement

and conclusion is wholly contrary to the evidence, which shows the following:

A check of Irving Newcomb, dated February 6, 1942, payable to James Fuller, in the amount of \$3750 (Gov. Ex. 161,) was deposited by Fuller on February 6th to the credit of Engineers' Group, Inc. (Gov. Ex. 163, R. 2702.) The Newcomb check was put through the bank as a cash item, but was not credited to the account of Engineers' Group, nor did the reason therefor appear in the bank records, nor did the witness from the bank have personal knowledge as to why it was not credited. He stated that on February 7, an item was left with the bank for collection in the amount of \$3750. (R. 2698-9.) When inquiry was made as to this discrepancy, shown by the bank stamp "Feb. 6, 1942" on the duplicate deposit slip handed to Smith, and the bank stamp "Feb. 7, 1942" on the check itself, he testified: "*It was put in as a cash item. For some reason it was withdrawn and entered for collection,*" and that payment was stopped by the bank on which the check was issued. (R. 2700.) The record shows that the letter of transmittal was sent to the issuing bank on February 7, 1942. (Saturday.) (Gov. Ex. 162.)

There was no evidence of any character that Smith was advised of or knew that such "Cash Deposit" item was changed, and the item entered for collection. In fact the evidence is definite that both Smith and Davis understood and believed that such deposit had been made and that the \$750 check of January 28, 1942 was not cashed. Smith had stated to Davis that the latter check, No. 326, was not to be cashed, but as the check had not been returned to him, he had not entered it in the books. (R. 1492.) Davis also testified that if the \$750.00 check had been withheld, there was, with \$3750 deposit of February 6, 1942, a sufficient balance in the bank to meet the \$3200 check on the date the check was issued. (R. 1493-1507).

"Q. I say, if the \$750 check had been withheld as you

understood it was to be withheld, there was sufficient to meet the \$3200 check in the bank on the date the check was issued?

“A. That is correct, sir.”

The \$3200 check is the Joseph Co. check to which the appellee has referred. See, to the same effect, the Record, pages 1655-1657, and 1666. In corroboration of Davis' testimony, the check stub for the \$750 check (Check No. 326, in Gov. Ex. 106) bears the following notation made in Smith's handwriting on Feb. 4, 1942: “Cancelled—Fuller did not cash as per advice from J. F. 2/4/42.”

Davis also testified;

“Q. As far as you could observe Smith did everything he could to keep the records straight?

A. Yes sir.

Q. And you tried to help him?

A. Yes sir.” (R. 1506.)

Smith advanced money to the company for expenses and made loans to the company. He filed with the company claims for credits, and had expended in excess of \$1,000 for out-of-pocket expenses on account of the business of the Engineers' Group. (R. 1499-1504.)

That Smith gave a bad check for \$750.00 to the Engineers' Group, as charged in Appellees' brief, P. 28, is disproved by the audit of Geneau, the F. B. I. accountant, (Gov. Ex. 170, Item 4.) Geneau traced every financial transaction of Engineers' Group, and his audit shows that Smith deposited his check for \$750.00 to the credit of the company, and later ordered payment stopped. This was another loan going from Smith to the Engineers' Group, in addition to the thousand already advanced, when something apparently occurred to make him change his mind and stop payment on his check.

Much has been made of the fact that checks were issued to Gifford, of the Bishop Company, and Haskell of Schweers and Smith. It must first be remembered that the contracts with these two firms had been negotiated long before Smith became connected with the company, and no evidence was ever produced that he knew anything whatever about them or participated in them in any way.

The circumstances shown by the record are these:

Schweers & Smith. On January 7, 1942, an Engineers' Group check was mailed to Haskell of Schweers & Smith in New York. The check was in the amount of \$3500.00. A letter was sent with the check in which Fuller says:

"Enclosed you will please find our check for \$3500 drawn to the order of your company; and it is herewith handed you with the understanding that as quickly as possible you will return this sum to us, without interest.

"Also attached hereto is your note for \$6,000, and we return same to you as we are unable to handle it per the arrangements of our last understanding."

(This letter is Govt. Ex. 87, and for the convenience of the Court is set out in the Appendix hereto, at page 34.)

The testimony concerning this transaction is that this was an attempt on the part of Fuller to help Schweers and Smith to release mechanics liens which had tied up their funds. The note for \$6000 had been given to him to discount for Schweers and Smith, but being unable to do so, Fuller returned it to them, together with the check for \$3500. The \$3500 was to be returned *within a few days, without interest*; in other words, on its face it was an accommodation loan, and had nothing to do with any deposit or advance fee.

J. W. Bishop Co. On January 15, 1942, a check of the Engineers' Group in the amount of \$3100 was sent by

Fuller to Frank Gifford, President of the Bishop Company at Worcester, with a letter. The letter is marked Gov't. Ex. No. 48, and is interesting.

The first paragraph mentions the conclusion of Bishop Company's negotiations on the housing project "Alexandria Village," (which Schweers and Smith obtained,) and the second paragraph reads:

"In confirmation of our understanding, this check insures you legally against any loss, and, as stated to you this morning, you are to hold it until you receive telegraphic or telephonic communication from me before depositing same."

(The letter is printed in the Appendix, at page 35.)

The \$3500 loan to Schweers and Smith was never repaid to Engineers' Group.

The \$3100 check to Bishop Co., was presented to the Engineers' Group Bank in Washington after Smith's resignation. What the details of the two transactions were he never knew, nor is there any evidence that either Schweers & Smith, or the Bishop Company, or Fuller ever communicated to him any information whatever about them.

From the records, however, it is apparent that there is nothing sinister about the transactions, but that some sort of friendly agreements had been entered into.

Davis, the auditor, further testified;

Fuller was in and out of the office and traveling a great deal of the time, "he would be in for maybe a day and right out again and be gone a couple of days and be right back or be gone one day and be right back and then be gone again." (R. 1498.)

"Q. Did you do anything there about letters and mail or telegrams that came for him," (Fuller)? A. No, sir.

Q. Miss Cooksey handled that? A. Yes, sir.

Q. Did Mr. Smith handle that? A. I do not recall Mr. Smith ever having done anything other than when Mr. Fuller was out of town and a telegram would come in, Miss Cooksey would hand it to him and he might read it or something like that." (R. 1499).

THE UNDERSTANDING OF THE PARTIES AS TO THE MONEY PUT UP.

At page 3 of Appellee's brief is the following:

"The amounts advanced were in the nature of advance fees or deposits, *and it was mutually agreed that they were to be returned to the depositor upon demand in the event Engineers Group, Inc., did not obtain for the depositor a contract.* Typical of the agreements under which the deposits were made are Exs. 9, 79, and 95."

The truth is as follows:

Anderson of Advertising Metal Display

Direct examination. R. 2665. "Q. Was anything said concerning the purpose of the payment of this advance fee?" A. That was to indicate our good intentions and also to help them offset the preliminary expense which they would have."

Anderson: R. 2693. Q. Referring to your meeting at the Blackstone Hotel and any other meeting that you may have had with Mr. Fuller, did he ever make any representation to you concerning the financial conditions of Engineers' Group? A. I asked him for specific information at this meeting.

Q. What did he tell you? A. And he told me that they could not furnish us a bank reference which would amount to anything because the firm was really just getting started and the magnitude of its operations would be such

that its present condition would not reflect anything of material importance."

When the contract of the Advertising Metal Display Co. with E-G was discussed in Chicago at the time of the January 11, 1942 meeting, Kreuger, the president, took part in the discussion. Anderson, who was handling the finances of the Advertising Metal Co. told Kreuger during the discussion that "*if he wanted to toss away \$7,500 on one chance, why this was it.*" (R. 2677). (Italics added.) In the discussion it was pretty clear that the transaction was a chance only, but Krueger nevertheless sent on the check, and it turned out that the chance was the kind of chance Anderson had thought it to be. (R. 2677).

And how was the deposit to be used?

The record tells: (R. 2678) "In the discussions that were had leading up to the signing of this contract and the deposit of the check, was anything specifically said about whether or not the check was to be used for expenses incident to obtaining the contracts that the Engineers' Group was trying to get for you? Do you understand the question? A. I believe I do. But I do not think it quite applies, because after all, we paid the money over to them and *how they used it would really be up to them to determine, not for us.*" (Italics added.)

Q. "What I mean to say is this: There was no hint or no indication in any of the conversations there nor in the contract itself, that that money was to be put aside in escrow and not to be touched by the Engineers' Group while they were working on this contract?" (R. 2679).
A. No.

Q. It was understood that it could be used but they must return a similar amount of money if satisfactory results were not obtained? A. Correct.

Q. Did you discuss with Mr. Krueger what might happen if they were not able to return the money. (R. 2680).
A. Yes.

Q. What was the discussion? A. We would just lose \$7,500.00.

Q. That is how it turned out? A. Correct."

The Witness, Anderson, then testified that he came to Washington in April or May, 1942, to see Smith, (2683) and,

"Q. You came here for the purpose of seeing what could be done to obtain the \$7,500 back in accordance with the terms of the contract, is that right? A. *NO SIR, I DID NOT.* * * * (R. 2684). (Capitals added.) He also identified correspondence between himself and Smith for more than a year after Smith's resignation from the E.-G. (Smith Ex. 19A, B, C, and D) and then: (R. 2682)

"Q. Was Mr. Smith at that time looking out for any other business or aiding your company in any way divorced from the Engineers' Group?

"MR. PAISLEY: Your honor, I do not think that is material what went on long after this thing folded up.

"* * * THE COURT: I will sustain the objection.

"MR. GALLAGHER: Very well, Your Honor. Exception."

Harry Donald Forse, of the Forse Corporation.

Forse made no demand for the return of the money. (R. 1272).

His company continued to do business with Engineers' Group long after Smith resigned. (R. 1300-1310-1311-1350-1358).

"The money of course was given to their company and could be used as they saw fit, if the company was as we thought substantially sound."

"Q. You did not expect that they would leave the money idle in a bank and undergo any considerable amount of expense without remuneration, did you? A. It took money for them to operate on. (R. 1291 and R. 1354).

* * * *

R. 1303. Q. Do you remember that on that occasion "the summer of 1944", you told me that the reason that you had not even tried to get your \$4,500 back from Engineers' Group or Mr. Fuller was because you felt that your company had received its money's worth in the work and activity Mr. Fuller carried on for the company? A. I don't think I said it in those words.

Q. All right, what did you say? A. I merely said that I thought they tried hard.

Q. Didn't you say you felt that Mr. Fuller must have spent in carrying on these negotiations and travelling, telephone and office expense, as much as he received from your company? A. I said he must have spent a lot of it.

Q. You really felt that you had received your money's worth for it? A. *I have never made complaint against him.*

Q. In fact, you told me on that occasion you did not have any feeling against any of the fellows in Engineers' Group; that you would even like to have Mr. James Fuller as your sales manager? A. *That is the remark I made.*

R. 1354. "Q. You had in mind pretty definitely what the money was being put up for? A. Yes, I knew that they were using money every day in their work."

And again:

Forse:

R. 1351-2. "Q. You gave Mr. Fuller the necessary information and he prepared and filed in the Office of Production Management at Indianapolis on November 19, 1941, the necessary information for them to give you a rating of some sort? A. It looks that way, yes.

Q. Do you recall now, going back to the first statement, what you told us about concerning the bank accounts in

the National Metropolitan Bank? Do you recall that?
 * * * Do you recall Mr. Fuller's statement to you that there was a bank account of this Engineers' Group at the National Metropolitan Bank? A. Yes. * * *

A. We wrote to the Bank.

Q. And the information you got was that they had a small balance there? A. Yes.

Q. The fact that they had only a small balance there did not affect your interest in getting the help of the Engineers' Group to get these contracts, did it? A. No, it didn't.

Q. Wasn't Mr. Fuller rather frank about the financial condition of the company,—that they did not have much ready cash? A. Yes.

Q. You were present when he telephoned to the Pilgrim Trust Company in Massachusetts, I believe you said.
 * * * Did he tell you that someone in Boston had agreed to advance \$10,000 to help finance these projects and the deposit was supposed to be made sometime in the afternoon of the 16th? A. I do not recall that in so many words.

Q. Do you recall, after he had gotten the word from the Pilgrim Trust Company, that there was no money there, stating to you and Mr. Hamilton that there was no money there; that he was very much disappointed to learn that but that was the situation, and if you gentlemen had lost interest because of the failure (R. 1353), to have this deposit that was the situation and you would have to make the best of it? A. I do not recall that but it could have been said to us at that time, yes.

Q. At any rate, you knew there was no money in the Pilgrim Trust Company? A. They had told me that.

Q. And you were satisfied to go ahead knowing that.
 A. Yes.

Q. It did not make much difference? A. No."

That Forse Corporation continued business with Engineers' after Smith and Underwood resigned, and the re-

lation between Forse and Fuller, is demonstrated by the correspondence between them. When informed by telegraph of the resignations, Forse wrote Fuller, on February 23, 1942, a letter, a copy of which is printed as an appendix hereto, (Page 36,) in which he solicits Fuller for help in securing business. This is marked Smith Ex. 10-Y, and is one of the important documents ruled out of evidence, to which due exception was taken.

A similar situation existed with the Norcor Company, which entered into a new contract with Engineers' Group on February 24, 1942, (R. 986—991.)

THE GOVERNMENT'S THEORY OF PROOF OF MISUSE OF FUNDS

R. 1391, 1395. "THE COURT: If you can show a diversion of money for purposes which were not the legitimate promotion of the company's business, that is something else.

MR. PAISLEY: I am not offering this, your Honor, to prove what they did with the money; we are offering it to prove what they did not do with the money, that they did not pay this man, and they certainly * * *

THE COURT: You cannot prove the affirmative by the negative. That is a new proposition to me * * * And later: "The burden is on the Government to prove fraudulent use of the money, that is, an illegitimate use of it, not in the reasonable promotion of the company's business; that would have a tendency to prove fraudulent intent."

There was no evidence of the misuse of any moneys during the time Smith was Treasurer; nor, as a matter of fact, of any misuse of funds whatever. Yet the prosecution constantly, in argument and in its brief, harps upon the fact that *money was spent*. That is the best evidence of good faith, that money was spent upon the business of the concern.

CONTRACTS WERE TENDERED AND ENGINEERS WERE AVAILABLE.

Harold E. Fuller, Norcor Company, testified that contracts were tendered his company, (R. 973.) Through the efforts of the Engineers' Group, (R. 1008), they were invited to bid on an ammunition contract with Willys-Overland. (R. 996 and again at 1001, 1008.) One bid was made February 28, 1942, R. 1001. Their original contract with Engineers' Group was made January 12, 1942. After Smith resigned, this contract was cancelled, and on February 24, 1942, they entered into a new contract with Engineers' Group, contemplating *future* services.

See also R. pp. 847-851-852-879-880-881-883-914,—relative to other contracts submitted.

Record 971: Fuller, secretary of the Norcor company, stated that the only person he met connected with the Engineers' Group was Mr. James Fuller, LATE IN FEBRUARY.

Q. (Mr. Paisley) "What did you do after you met Mr. Fuller? A. Well, we had several conferences going into details on several proposed contracts for the manufacture of ordinance items.

Q. Did he tender your corporation any contracts? A. Yes he did.

Q. What kind of contracts did he tender? A. As I recall, they were subcontracts through the Willys-Overland Company of Toledo. * * * That company sent a representative to the plant. (998).

And it was further testified by this witness that the first contract made with the Engineers' Group was cancelled by agreement on February 24, 1942, (after Smith had resigned), and a new agreement was entered into by a letter dated February 24, 1942, whereby the Engineers' Group *was to retain the money deposited and deduct from it the*

bill for services to that date; and to remit the difference between the two, if there was any difference, to the Norcor Company. R. 986, 987, 988, 989, 990, 991.

The reason the Norcor bid was rejected, (R. 1007) was that the Norcor Company did not have the equipment, nor the skilled workers, necessary to perform, and for those reasons the bid of the Norcor Company was rejected by the Willys-Overland.

Donald Forse had a conference with Major Hawkins, acting for Engineers' Group, in reference to a contract to make fuses. R. 1289 and 1337. As to other contracts see: R. 1259, tank transmissions; bullet noses, 1265, 1289, 1349; shell loading, 1270, and 1271.

The reason the Forse Company lost the Willys-Overland contract on which they bid was not the fault of the Engineers' Group. R. 1335.

Anderson, of Advertising Metal Display Co., said that Fuller called at the plant about three weeks after their advance fee was paid, and had a conference regarding production of detonator caps, at which time Fuller had blue-prints and a sample of the item; that Fuller suggested that they set up a separate department or company to manufacture this detonator and it was felt that the equipment to be set up for its manufacture could later be used for other items. (R. 2690 et seq)

Malcolm Leach of Glenwood Stove & Range Co., testified:

R. 1020. "Q. Did you ever get any contracts from Engineers' Group? A. We never accepted any.

Q. Were any offered you? A. Yes."

The contract with the Russian Government (the Amtorg contract,) was thoroughly discussed from an engineering and legal end. R. 1098.

There were other contracts besides the Russian proposal (R. 1103) taken up with Glenwood.

FURTHER CONFUSION

At page 4 of the Appellee's brief, in connection with the Norcor company, occurs this statement:

"As a matter of fact, the defendant, James Fuller, had given *bad checks* for the down payment to the vendors of the machinery, etc." In support of this, Gov. Ex. 74 through 78, and Ex. 111 are referred to. Of this, this evidence, appellee says: "*It had tremendous force as to the absence of good faith behind the enterprise.*" It is somewhat startling to learn from the record that Exhibit 111 was admitted only as to James G. Fuller, (R. 1556. "THE COURT: It will be admitted against the defendant Fuller. I do not know that it is any evidence against the other defendants.") And Exhibits 74 through 78 *were not admitted at all.* (See Clerk's record of exhibits, in Record from lower Court.)

The transactions referred to occurred on March 3, 1942, (R. 1559,) and had no possible connection with Smith, who had resigned in February. There is not the slightest effort in Appellee's brief to inform this Court of the above state of the record; on the contrary the "tremendous force" of the imaginary evidence is advanced as a reason for sustaining the convictions. It is almost impossible to protect a defendant's rights in such prosecutions. Even the learned prosecutors lost track of the fact that five of their own exhibits had been excluded from evidence, and the sixth had been restricted to one defendant. How could a jury be expected to keep these matters straight, even with an adequate and specific charge as to each document? Herein the charge to the jury made no mention of *specific documents* and the limited pertinence and admissibility of the testimony, or of Exhibit 111.

ENGINEERS AND ENGINEERING.

Malcolm Leach, of Glenwood Range Co., testified that Major Hawkins said that he had 20 of his engineers he

would bring along with him, for the purpose of carrying out the munitions contract. There can be no doubt that Major Hawkins was telling the truth and was ready to produce both the engineers and the engineering skill, whenever necessary. R. 1098.

Major Anderson, of Advertising Metal Display; Hall inspected Advertising Metal Display manufacturing plant. R. 2671. Mr. Howard, of Whitman and Howard, Engineers, and an assistant came to the plant, stayed for two days, checked every piece of equipment, and measured off all space in the plant, R. 2674; 2687-8.

Fuller sent Kerlin, one of Hawkins' Engineers to survey the Forse plant in contemplation of a shell loading contract. R. 1289, 1257-8, 1288.

Major Hawkins' testimony establishes beyond a doubt that he knew that the Amtorg contract was available to Glenwood Co., and that he had a large force of competent engineers available at all times.

Major Wilford J. Hawkins, admittedly one of the leading engineers and experts in his field, testified both as to profert of contracts and as to the engineering staff he had ready to take over the operations of any manufacturer.

Hawkins also testified that in an early discussion with Fuller looking to the building up of an engineering staff for Engineers' Group, he informed Fuller that, in addition to himself, and the engineers Apple and Kerlin, he had available a dozen other engineers and experts for the carrying out of any contract. (R. 1868-1873.) He had conferences as a representative of Engineers' Group with officials identified with Amtorg regarding the proposal for the Russian ammunition order. (R. 1842-44, 1853.) He and other engineers through him in the employ of the Engineers' Group made engineering surveys of various plants, including Glenwood Range Co., in connection with the Russian order and the Forse Corporation for the pur-

pose of determining availability as a sub-contractor under the Glenwood contract, and for the purpose of finding facilities. (R. 1848-1850-1853-1857, 1874.) He had sent various engineers to plants such as Forse Co., Norcor, Advertising Metal Display, for surveys.

Obtaining the Russian order was a question of availability of facilities, (R. 1846,) and the Amtorg were doing all they could to expedite the release of the order or the release of the final negotiations with the Glenwood Company, (R. 1854,). Written commitments had been obtained from some of the subcontractors under the Amtorg proposal, under a prime contract to the Glenwood Range Company. (R. 1855.)

Glenwood Range asked for a statement from prospective subcontractors, (R. 1867;) and that at the request of Glenwood, the Engineers' Group secured a firm commitment from the Atlas-Ansonia Powder Company for shell loading under subcontract to Glenwood.

Hawkins conferred with the president of the Apco-Mossberg Company; the latter was interested in securing a subcontract under the Amtorg proposal, (R. 1848, 1863,) and he conveyed this information to Fuller; and the part of the Amtorg contract which required forgings they expected to take to the Apco-Mossberg plant under subcontract to the Glenwood Range Company. (R. 1873).

That Fuller had requested from him, in Chicago, a list of the machines required to manufacture parts for "Navy primers" for what he thought related to the Norcor Company. (R. 1864.)

That the younger men of the firm at Glenwood wanted to take on the Amtorg contract, BUT THAT THE ELDER MR. LEACH, WOULDN'T GO AHEAD WITH IT BECAUSE IT WAS TOO LARGE AN UNDERTAKING.

That finally the order from Amtorg for the 37mm. shot went to Willys-Overland, through the efforts of Fuller and

himself, exerted on behalf of various concerns, (R. 1864-1865.)

(R. 1841) Hawkins on December 9, 1941, negotiated about the Russian order with a Mr. Berkel, a member of the Amtorg in New York, with regard to the 37 Millimeter AP shot; Hawkins was trying to find out from Berkel also the program of their purchases in the United States to report it to Mr. Fuller, in order to expedite the Amtorg order; Fuller wished to place the order with one of his clients. On December 12, 1941, Hawkins went to Taunton and saw Mr. Forbes, of Glenwood, and Mr. Leach, and Mr. Motley, their lawyer from Boston, and talked with them; he was looking for a suitable plant in which to manufacture 37 mm. anti-tank AP shot of a character that would meet United States Army specifications under United States Army inspection. Needed quite a considerable plant or else quite a considerable number of subcontractors to supply the parts to the final assembly plant. The plant at Glenwood was not satisfactory, after a complete survey and investigation, and the use of sub-contractors was suggested in case they chose to take the contract. Glenwood asked for a statement from other plants as to what they could and would do in the event they received an order. Among other plants were the Apco-Mossberg Company and the Atlas Manufacturing Company.

Hawkins surveyed the Apco-Mossberg plant, and the Atlas plant for Engineers' Group, and reported back to Fuller. On December 14, 1941 he surveyed the Atlas Ansonia Loading Plant Division, at North Haven, Connecticut, and negotiated an agreement. (R. 1849.) He sent Apple, another expert and engineer, to the Union plant at Providence, Rhode Island, to survey it, to see whether it could manufacture any part of the 37MM. shot. On December 16, 1941, Apple and Hawkins went to Attleboro to look at the plant of the Johnson-Clancy company, and

felt that they could furnish "jigs" and fixtures, and possibly some gauges, but could do no production work on the Amtorg order. On December 18, 1941, at Washington, he conferred with Fuller, who was anxious to have some direct action taken to expedite with the Russian Committee in Washington the order *which had been recommended by the Amtorg in New York City.* (R. 1852) He heard Geo. Eichelberger ask to be connected in some capacity if the job went through. (R. 1877.)

On December 19, 1941, Hawkins went to New York City to see Berkel about the Russian matter. Asked Berkel whether there was any news on the matter and *he said that the Amtorg were enthusiastic about the proposition of having the shot manufactured at the Glenwood plant and that they were doing all they could to expedite the release of the order to the Glenwood Company, and to the contractors who had made commitments.* "Berkel knew in a general way what the situation was and what commitments had been made by some of the subcontractors, and he had faith in my ability to run a contract of that sort." Had dinner at the Biltmore with Berkel, Apple, and Kerlin and discussed a merger of certain of the companies that would also be sub-contractors, also talked with Apple and Kerlin at the Yale Club about the same matter, on that day, December 21, 1941. Sent Kerlin and Apple to Anderson, Indiana, to the Forse plant, and elsewhere, December 22, 1941. Also wanted to ascertain whether any royalty payments would have to be made on an electrical heat treating method in use at the Tocco plant, if the method should be used with the 37 mm. shot. Had talked with a Mr. Capita in New York who operated such a process, but wanted to check it.

That they went to the Forse plant to determine whether it would be suitable to assist in the manufacture of the Russian requirements. He also testified to many and varied services he and his associate engineers had performed. Also

that Mr. George Eichelberger a brother of General Eichelberger, had put him in touch with Fuller and introduced them, (R. 1876) at the Sherry-Netherlands Hotel in New York, on November 16, 1941.

He stated that during the time he was engaged with Fuller, reaching up to April 6, 1942, (R. 1859,) he was constantly and vigorously engaged in trying to perform for him the services Fuller asked of him. That as a result of later negotiations with Fuller, the 37 mm. shot order from Amtorg went to Willys-Overland. These negotiations came later, and resulted in Willys-Overland getting an order for seven or eight million Navy primers and also getting an order for four and a half million 37 mm. anti-tank shot from Amtorg.

NO SOLICITATION NOR MISREPRESENTATION BY APPELLANT SMITH

At Page 3, Appellee's Brief:

"In addition to the victims who lost their deposits, the *defendants* sought unsuccessfully to induce many others to pay over money to Engineers' Group, Inc., under the same type of contract and under the same misrepresentations and inducements (Tr. 1508, 1422, 1944, 2015, 1985, 2118, 2448, 2135)." And at p. 29 of Appellee's Brief, "he" (Smith) "continued to solicit other advance fees."

The record shows that the defendant Smith solicited no one.

At p. 17, of Appellees' brief it is stated that Major Hawkins Engineers' Group munitions expert and engineer, testified that Smith went with him to the Glenwood Range plant in Taunton, Mass. Neither Major Hawkins nor any other witness so testified. The record does not show that Smith was ever at Glenwood Range Co. (Hawkins, R. 1813) (Leach, R. 1044, 1046.)

Anderson of Advertising Metal Display Company for the first time saw Smith in April or May, 1942, and discussed with him the endorsement on the \$7,500.00 check deposited by the Advertising Metals Display Co. (Gov. Ex. 159), which bears the endorsement of Smith's name, but not his signature, R. 2669. Smith cooperated with him in attempting to trace the check, and gave him an affidavit for use in an effort to recover the money. (Smith, Ex. 20)

There was no soliciting here.

At p. 22, Appellee's Brief;

"He was in Chicago at the Blackstone Hotel when Engineers' Group was endeavoring to obtain deposits from Advertising Metal Display Co., Norcor Manufacturing Company and others."

Anderson. R. 2657-8; 2666. Anderson met Fuller, Underwood, Hall, Bemis, Englehardt and Williams at Blackstone Hotel in Chicago on Sunday, about the eleventh of January, 1942, when discussion was had concerning Engineers' Group and agreement. Smith's name was mentioned by Fuller as Treasurer, and identified as an "outstanding lawyer." R. 2659; 2678. The first time he met Smith was in April or May of 1942; never received any communication or correspondence from Smith regarding anything stated at the January 11 conference. And see Schumacher's testimony at p. 31, herein.

It is undeniable that Smith was *not* present at the Blackstone for any such conference, and did no soliciting.

Anderson's testimony was the proof under Count 13 of the indictment—and Smith was found guilty!

The honesty of the appellant Smith can hardly be illustrated more emphatically than by examining the attitude and relation he stood in with respect to the companies he is charged with defrauding: Forse and Hamilton, of the

Forse Corporation; Anderson of the Advertising Metal Display company; and Fuller of the Norcor Corporation, are eloquent witnesses to this. And after the demise of the Engineers' Group, he was in the estimation of Haskell, who represented both Schweers and Smith, and the Bishop Co., of such integrity that they had determined retaining him in the event they needed an attorney in Washington. (See stipulation, Vol. 9, R. 1216). The Advertising Metal Display Co. did in fact employ his services long after the closing up of Engineers' Group, Inc., and both Forse and Hamilton of the Forse Corporation called upon him for assistance and advice and utilized his services thereafter.

Forse, who was negotiating a contract with Fuller at the time, was "not at all certain" that Smith was present at the conference in Washington, on December 16, 1941, (R. 1317), when he was given a brochure. With respect to this brochure, the record does not indicate that Smith even knew of its existence.

Williams. R. 2162. He had very little contact with Smith; and could not recall any contact with him regarding Engineers' Group business. R. 2165.

Delaney. Although he had been asking for help in correspondence with Donald Wakefield Smith from July, 1941 and had conversations with him relating solely to the business of the Faultless Rubber Co., Smith had never mentioned the Engineers' Group. It was when Delaney came to Washington, in January, 1942, to make inquiry, that the Engineers' Group was first mentioned. Smith "told him frankly what had to be done," and he lost interest.

Scantlebury, Toycraft Rubber, met Smith on December 29, 1941. Tr. 1987.

"Blackmore and Smith talked over labor relations and things of that kind. There was nothing pertaining to any business in particular."

No questions were asked of Smith about Engineers' Group. R. 2005. Toycraft did not retain Engineers' Group.

Scantlebury is, despite the foregoing, cited as another instance showing that Smith was active in the solicitation of fees. See Appellee's Brief, page 25, (f).

John L. Hamilton, of **Forse Corporations**, was present during all the conferences between Donald Forse and members of the Engineers' Group in Washington, in December, 1941, leading up to the agreement between the Forse Corporation and Engineers' Group, Inc. He testified, R. 1369, that his meeting with Smith was not by appointment, and his discussion with Smith was primarily "a request for information on my part." That the discussion with Smith was as an attorney, and not as any representative of Engineers' Group. (R. 1373.) That he did not recall that Smith ever recommended Engineers' Group, (R. 1374). He never talked with Smith about any contracts which Engineers' Group submitted to Forse Corporation (R. 1375), that Smith did not at any time make any representations to anyone concerning Engineers' Group, or who was connected with it, or what they could do. (R. 1378).

He also testified that Smith represented the Forse Corporation in Washington, D. C. *after the failure of the Engineers' Group, as late as June, 1943.*

Harry Donald Forse testified relative to transactions with Smith after the demise of the Engineers' Group, and during 1943;

R. 1359. A. I believe the one that we discussed further work with was with Mr. Smith.

Q. Donald Wakefield Smith? A. Yes.

Q. And you took up a number of other matters with him as late as 1943, didn't you? A. Yes, I believe we did.

Q. Mr. Hamilton, I think, came to Washington and took some matters up with Mr. Smith? A. That is right.

Q. And he found his services perfectly satisfactory?

A. We had no complaint.

The Appellee's Brief, page 22, repeats that Smith took part in an interview *on January 12, 1942*, with Schumacher, Fuller, Hall and Underwood, at the Blackstone Hotel, in Chicago.

Schumacher, of Norcor (R. 840). "Q. Do you recall ever seeing Smith, Donald Wakefield Smith, in Chicago or anywhere else, in connection with Engineers' Group in any transactions. A. *I never saw him in person, no, sir. * * **"

Q. You didn't meet Mr. Smith? A. I don't remember him being in the room. * * *

Q. I understand Mr. Schumacher, that you said when you started your testimony you met a Mr. Smith. A. Williams.

Q. Williams? A. Yes.

R. 876. GALLAGHER: One of the overt acts charges Mr. Smith with being present at this conference with Mr. Schumacher, in Chicago, and Mr. Schumacher has said definitely that Mr. Smith was not there. Do you want us to take those matters up as we go along?

THE COURT: I think you had better wait. I suppose there will be a motion at the end of the case that that is the time you should take it up."

And the prosecution says, from this type of testimony, "Smith was shown to have been active in the solicitation of advance fees. For instance: (a) Schumacher, etc., etc."

Note: It was on this same *January 12, 1942* that Delaney saw Smith in Washington, D. C. (R. 1512.)

P. 24, Appellee's Brief.

"Smith said that Engineers' Group had obtained contracts for other manufacturers; * * * to Wm. H. Forster, Jr., of the Hays Manufacturing Co."

Compare the record, (1449), of Forster's testimony;

"Q. What, if anything, did Mr. Smith say at that time as to whether or not the Engineers' Group had obtained contracts for other manufacturers? A. He said they had and he mentioned, as I recall, two companies.

Q. Do you remember who they were? A. One, I believe, was the Forse Company, and the other was the Glenwood Range. *With one of those companies, as I recall, he said they were in the process of negotiating* but the other, and which one I am not sure now, he claimed they had gotten contracts for." The foregoing took place on Jan. 19 or 20, 1942. The witness wrote to the Forse Company and Glenwood Range. (R. 1457.)

"Q. And you wrote these letters *at the suggestion of Mr. Smith* so that you could have some independent information as to the nature and the type of work that Engineers' Group were doing? A. Yes, sir."

This is hardly the conduct of a man who is trying to mislead, and defraud, and shows that Smith told Forster the truth.

The letters in question were identified as Smith Exhibits No. 12, 13 and 14, *by the witness*, but were excluded from evidence, together with other exhibits.

CONCLUSION

It is respectfully submitted that the more closely the record and exhibits are examined, the more apparent it becomes that the proof fell far short of establishing any of

the essential elements of the crimes charged against the appellant Smith. For this reason, it was urged in the Court below that a verdict should be directed in Smith's favor on all counts; and it is urged here that the case as to Smith should be reversed.

The attention of the Court is also called to the case of *Kotteakas, et al v. U. S.*, U. S. Supreme Court, decided June 10, 1946, after the oral argument herein, which is closely parallel to this case.

WM. A. GALLAGHER
203 Union Trust Bldg.,
Washington, D. C.

Attorney for Appellant.

APPENDIX

Gov't Ext. No. 87
7 January 1942

Schweers & Smith, Inc.
5 East 44th Street
New York, N. Y.

Attn. William P. Haskell

Dear Mr. Haskell:

Enclosed you will please find our check for \$3500 drawn to the order of your company; and it is herewith handed you with the understanding that as quickly as possible you will return this sum to us, without interest.

Also attached hereto is your note for \$6000, and we return same to you as we were unable to handle it per the arrangements of our last understanding.

Very truly yours,

ENGINEERS' GROUP, INC.
(Signed) JAMES FULLER

Executive Vice President

JF:ehc

P. S. — Hold this check, Bill, until I 'phone you from Toledo, Ohio tomorrow afternoon.

JF
(initialed) J.F.

Gov't No. 48
15 January 1942

Mr. Frank Gifford, President
J. W. Bishop Company
109 Foster Street
Worcester, Mass.

Dear Mr. Gifford:

Per my conversation with you on the telephone this morning, enclosed you will please find our check of even date, in the amount of \$3100., concluding the negotiations on the low cost housing project, "Alexandria Village", Alexandria, Va. — E-G Corporation.

In confirmation of our understanding, this check insures you legally against any loss, and, as stated to you this morning, you are to hold it until you receive telegraphic or telephonic communication from me before depositing same.

We have some business unfolding in Massachusetts, of the industrial class, and you are first in line as far as I am concerned, to handle it. It will be two or three weeks yet before we can get it shaped up for your consideration.

Sincerely yours,

ENGINEERS' GROUP, INC.
(Signed) JAMES FULLER

Executive Vice President

JF:ehc
Enc. (\$3100)

SMITH 10-Y

FORSE CORPORATION ANDERSON, IND.

ENGINEERS CREATING TOMORROW'S DESIGNS . . . TODAY

Feb. 23, 1942

Engineers' Group, Inc.
1022 17th St., N. W.
Washington, D. C.

Attention: Jim Fuller

Dear Jim:

We have your day letter concerning the reorganization in your company. John was in Washington last week on other matters and dropped around to your place once or twice and knew that something was wrong and anticipated some such a move as this.

Maybe this will speed things up for you and help us to get somewhere. We seem to be getting exactly no place and if you have to worry around about your own organization—at the same time trying to develop business—I can understand the problems you're working under.

At any rate, Jim, don't forget we're here at Anderson looking for some of this business and we're counting on you to come across.

Yours truly,

FORSE CORPORATION

(Signed) H. D. FORSE, *Pres.*

H. Don Forse
AW

